IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 21-ICA-321

(PRESTON COUNTY CIVIL ACTION NO.: 18-C-7)

ROBIN GOODWIN,

Defendant below, Petitioner

v.

JAMES R. SHAFFER and IRIS M. SHAFFER

Plaintiffs below, Respondents

APPEAL FROM THE FINAL ORDER AND JURY VERDICT OF THE PRESTON COUNTY CIRCUIT COURT

RESPONDENT'S BRIEF

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I. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

A. The Circuit Court correctly denied the Petitioner's Motion to Dismiss on the ground of *res judicata* as the Petitioner failed to satisfy the three elements of Blake to bar prosecution of the current case. Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 498 S.E.2d 41 (1997)

B. The Circuit Court correctly determined the Respondents submitted sufficient evidence to support the jury's verdict finding the Respondents had obtained a prescriptive easement. O'Dell v. Stegall, 226 W.Va. 590, 730 S.E.2d 561 (2010)

C. The Circuit Court correctly determined the Respondents provided sufficient evidence to support the jury's award of punitive damages.

D. The Circuit Court correctly determined that the Respondents submitted sufficient evidence to support the jury verdict finding in favor of the Respondents on their nuisance claim.

E. The Circuit Court correctly denied the Petitioner's motion for a new trial based on Rule 19 as all necessary parties were joined by the Respondents' Amended Complaint (Joining Indispensable Parties).

F. The Circuit Court correctly denied admission of an unverified pleading filed by a now disbarred attorney to justify the Petitioner's outrageous conduct.

II. STATEMENT OF THE CASE

In 1973, the Respondents, James R. "Dick" and, his wife, Iris M. Shaffer, purchased a two-story yellow home located at 203 Tunnelton Street, Kingwood, WV, 26537. (JA0000051-JA000052, JA000287-JA000288, JA000876-881, JA0000536, JA000564) To the right of the home was a driveway that appeared to belong with the Shaffer's home. (JA0000066, JA000165, JA000260, JA000280, JA000288, JA000306, JA000344, JA000352, JA000353, JA000380, JA000468, JA000519) There were a row of pine trees running parallel along the southern border of the driveway, separating the Shaffer property, including their driveway, from their neighbors' property. (JA000066, JA000247, JA000258) Mr. and Mrs. Shaffer, immediately upon moving into their new home in 1973, started using the driveway on a daily basis to park their cars and to

access the rear of the home. (JA0000165, JA000000238, JA000254-JA000258, JA000287-JA000289)

Beginning in 1973, Mr. and Mrs. Shaffer parked their vehicles in their "driveway" every day, believing they owned the driveway. (JA000165, JA000516-JA000519) The Shaffers also used their driveway as ingress to the rear of their home so they could access the coal storage for their furnace. (JA000165) Mr. and Mrs. Shaffer would occasionally give others permission to use their driveway, mostly during the buckwheat festival, but also at other times. (JA000165, JA000337-JA000343, JA000564-JA000566) The Shaffers' open use of the driveway continued for more than 40 years and during this time, no one gave them permission, and no one even questioned the Respondents' use of their driveway. (JA000287-JA000296)

The Petitioner, Robin Goodwin, and her late husband purchased their property, located south of the Shaffers' home in 1999. (JA000131-JA000133, JA000887-JA890) The Shaffers' driveway is located north of the Petitioner's property. (JA000066, JA000245-JA000246) From 1999 until 2015, the Respondents, Mr. and Mrs. Shaffer, continued their daily use of their driveway, without permission or interference from the Petitioner or her late husband. (JA000287-JA000304) In fact, no rightful owner of the alley attempted to oust the Shaffers from using their driveway. (JA000287-JA000304)

Sometime in 2010, the Petitioner placed a decorative white fence parallel with the pine trees on the Petitioner's side of the driveway which encompassed the Petitioner's "entire property line." (JA000662, JA000066). This decorative fence did not block or interfere with the Respondents' driveway. (JA000066, JA000891, JA000892, JA000922, JA000662). The placement of this fence confirmed the Respondents' belief that the roadway next to their home

was indeed the driveway that belonged with their house. (JA00066, JA000891, JA000892, JA000922)

In September of 2015, without warning or "neighborly" conversation, the Petitioner, her late husband, and/or her agents placed a temporary fence across the alley and completely blocked the Shaffer's use of their driveway. (JA0000927- JA0000931) At that time, the Respondents hired attorney Rebecca Eritano, to prove they owned the driveway, and to make the Petitioner move the temporary fencing that obstructed the driveway. (JA000930-JA000936) Ms. Eritano filed a declaratory judgment action pursuant to W.Va. Code §55-13-1, et seq., on the erroneous belief that the Respondents' deed encompassed their driveway. (JA000930 - JA000936) Ms. Eritano also requested injunctive relief from the Circuit Court requiring the Petitioner to remove the temporary fencing based on the parties' respective deeds. (JA00000930 – JA000936)

The Petitioner's then counsel, Kevin Tipton, filed a motion for summary judgment arguing the parties' respective deeds were not ambiguous and the declaratory judgment action should be dismissed based on the clear language of W.Va. Code §55-13-1. Judge Frye, sitting by special assignment, held a telephonic hearing on the Petitioner's motion for summary judgment in November of 2015, about two months after the complaint was filed. (JA000927-JA000929) Following this hearing, Judge Frye entered an Order granting the Petitioner's motion, finding the parties' deeds were unambiguous and dismissing the declaratory judgment action pursuant to W.Va. Code §55-13-1. (JA0000016-JA0000020, JA0000927-JA000929)

Despite Judge Frye's ruling finding the parties' respective deeds were unambiguous and the properties did not overlap, the Petitioner and her late husband installed new fencing, a building, and other obstructions over and across the Respondents' driveway in January of 2016. (JA000069, JA000893, JA000918, JA000332-JA000333) Based on these new actions of the

Petitioners in 2016 and the lack of communication with Attorney Eritano[1], the Respondents sought and hired new counsel for legal help to protect their driveway. (JA000053- JA000059)

Despite the frustration, aggravation, and inconvenience caused by the blockage of their driveway, the Respondents did not take the law into their own hands. (JA000332, JA000376) The Respondent, Dick Shaffer, told his grandson, "He wanted things done, he said, the right way." (JA000332) When Mr. Shaffer's son, Timothy Shaffer, wanted to "kick the shit out of" Robert Goodwin for "taking his parent's property," Mr. Shaffer told his son, "don't do that, we'll do it the correct way." (JA000376) According to his grandson, "Pap was big on no conflict." (JA000332)

The actions of the Petitioner and her late husband, when they placed fencing, trees, bushes, and a building on the Respondents' driveway prompted Mr. and Mrs. Shaffer to file the instant action wherein they asserted five causes of action: 1) prescriptive easement; 2) Private Nuisance; 3) Civil Conspiracy; 4) Trespass; and 5) Injunctive Relief. (JA000053-JA000059, JA00064 – JA000074)

In Count One, the Shaffers sought a prescriptive easement to the portion of the private alley they had used as their driveway for over 40 years. (JA000053-JA000059, JA000064-JA00074) In Count Two, the Shaffers claimed the Petitioner committed a private nuisance; in Count Three the Shaffers claimed the Petitioner committed a civil conspsiracy; in Count Four the Shaffers claimed the Petitioner committed trespass; and, in Count Five the Shaffers requested injunctive relief. (JA000053-JA000059, JA000064- JA000074) Counts Two, Three, and Four

[1] Attorney Eritano's license to practice law was annulled due to her failure to follow through and properly represent her clients. (JA000004, JA000039-JA000040, JA000667)

were directly related to the Petitioner's conduct, behavior, and actions beginning in late January of 2016 when the Petitioner and her late husband installed fencing, planted trees, and constructed a building upon the Respondents' driveway; requiring the Respondents, who were in their 80's, to park across a busy street, in a business parking lot, and walk to their home. (JA000053-JA000059, JA000064- JA000074, JA000329- JA000330)

After some discovery, counsel for the Respondents filed a Motion for Summary Judgment, asking the Court to find there were no genuine issues of material fact regarding their prescriptive easement claim. (JA000949-JA000960) The lower court held two evidentiary hearings on the motion for Summary Judgment and heard the testimony of several witnesses. Goodwin v. Shaffer, 246 W.Va. 354, 873 S.E.2d 885 (2022) The lower court then granted partial summary judgment to the Respondents and found there was no question of fact regarding the prescriptive easement from 1973 to 1999. Id. The Petitioner appealed the decision to the West Virginia Supreme Court of Appeals. who reversed and remanded the issue back to the Circuit Court to be determined by a jury. Id

Following the remand, and in anticipation of a jury trial, the lower court held a pretrial conference. (JA000006) At this conference, the Court reviewed the Petitioner's pre-trial memorandum which indicated an issue regarding indispensable parties who needed to be joined in this case pursuant to Rule 19 of the Rules of Civil Procedure. The Court ultimately agreed the Respondents' "driveway" was a portion of an express easement that was dedicated to the owners of property on Brown Avenue. (JA000006) The Court was able to determine the rightful owners of the alley based on a 1900 deed, combined with a 1970 Circuit Court opinion. (JA000006, JA000064–JA000074, JA000746-JA000779)

In 1900, an express easement for an alleyway, to run along the northern boundary of the Brown Avenue properties was reserved by W.G. Brown in a conveyance of the Brown Avenue properties to J.W. Watson. (JA000031-JA000032) The 1900 deed states, "an alley way is to be maintained the width it now is along the Northern boundary of said lot for the benefit of those who have heretofore and may hereafter buy lots of the said Grantor on Brown Avenue, and said Alley way is to be reserved from Tunnelton Street through to Price Street, through the several lots hereafter to be sold by said Grantor." (JA000031-JA000032)

This "private alley" was also the sole issue in a prior Preston County Circuit Court Case; *Robertson v. Whetsell,* Preston County Civil Action No. 484, filed in August of 1964. (JA000033-JA000038) In his 1970 Opinion in *Whetsell*, Judge Snyder stated, "the dedication was an easement establishing a private way." (JA000033-JA000038) Judge Snyder further found that the " . . . pleadings show and disclose that the property over which this alley is alleged to run was conveyed to individuals fronting on Brown Avenue with the right of the individuals fronting on Brown Avenue to use the same." (JA0000033-JA000038) Accordingly, the Preston County Circuit Court determined, in 1970, that the strip of land in question in the instant case was a private alley dedicated for the benefit and use of the Brown Avenue property owners. (JA000875 -JA000881) Robertson v. Whetsell, Preston County Civil Action No. 484

Based on this finding, the Court Ordered the Respondents to Amend their Complaint to add the following eleven (11) defendants who own an interest in property fronting on Brown Avenue: Paul Someruck, Mary Someruck, Theresa Bautista, Paul Hart, Wendy Hart, AJane Properties, LLC, Patrick "PJ" Crogan, Jane Crogan, Christopher Ranieri, French Barnett Jr., and James H Wolfe III. (JA000064-JA000074, JA000179-JA000180)

On September 18, 19, 20, and 21, 2023, a jury trial was held. The Respondents presented their witnesses, exhibits, and argument to a properly impaneled jury. (JA000202-JA000826) The Shaffer Respondents presented the testimony of James Shaffer, Chris Shaffer, Iris Shaffer, James Shaffer, Jr., Timothy Shaffer, Thomas Shaffer, Patrick "PJ" Crogan, Ellen White, Jimmy Maier, French Barnett, Jr., and others, who testified to the long-time open use of the alley by the Respondents as their driveway. (JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475- JA000502, JA000516-JA000525, JA000536, JA000543-JA000551, JA000564- JA000569, JA000547-JA000550)

The Respondent, Mr. James R. "Dick" Shaffer, testified that he began using the driveway immediately after he and his wife purchased the property in 1973. (JA000287-JA000289) Mr. Shaffer testified that he simply thought he owned his driveway and that it belonged with the home. (JA000295) He testified that he and his wife parked their vehicles in the driveway every day from 1973 until it was blocked by the Petitioner. (JA000294) Mr. Shaffer testified he had even granted permission for others to use the alley during the Buckwheat Festival so they could park in the backyard. (JA000564-JA000569) Each of the Respondents' witnesses testified that Mr. and Mrs. Shaffer used the alley to the right of their home as their driveway as long as they could remember and that cars were parked in the alley daily. (JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475- JA000502, JA000516-JA000525, JA000536, JA000543- JA000551, JA000564- JA000569, JA000547-JA000550) Mr. Bill Stone testified the Mr. Shaffer paid him at least two times to bring gravel for the maintenance of the driveway. (JA000529-JA000533)

Patrick "PJ" Crogan was joined as a Defendant in this case because he owns and resides on property that fronts on Brown Avenue. (JA000475-JA000476) Mr. Crogan testified regarding his knowledge of the alley being used as the Respondents' driveway and that he never gave the Respondents permission to use the alley as a driveway. (JA000492, JA000474- JA000502) Mr. Crogan, who had lived in the area most of his life, testified the Respondents' use of the alley was "pretty obvious." (JA000502)

"Q. And have you ever seen them using that
alleyway to park their vehicles?
A. Yes.
Q. And when would you have seen them using this
alleyway? Was it sporadically? Was it --
A. No, if you use the word notoriously, it's --in a case like this. But from the time they moved in there, they always used the alleyway."
(JA000479)

Mr. and Mrs. Shaffers' sons and a grandson testified to the regular and consistent use of the alley by their parents/grandparents for as long as they could remember. (JA000227-JA000247, JA000251- JA000265, JA000326-JA000329) The Respondents' sons and their grandson also testified how the actions and conduct of the Petitioner, her late husband, and her agents (by blocking the driveway with fencing, trees, and buildings) caused the elderly Mr. and Mrs. Shaffer emotional distress, aggravation, annoyance, and inconvenience. (JA000362-JA000365, JA000329-JA000332) When Christopher Shaffer, the Respondents' grandson testified about how his grandparents were dealing with the situation, he said it has been, "just nerve-racking, can't sleep. Of course, they're both in their 80's. They shouldn't be walking across the street to get to their vehicle. (JA000330)

Marilynn Coffman, a friend of the Shaffers, who was only able to attend the Buckwheat Festival when the Shaffers gave her permission to park in their driveway also testified. (JA000564- JA000569) Mrs. Coffman testified the blocking of the driveway "has really taken a toll on Dick and Iris," and she could see it was "bothering them both really bad." (JA000566)

Iris Shaffer, one of the Respondents in this case, testified that the situation was "upsetting." (JA000547) She said, "Dick can't sleep." (JA000547) She testified she couldn't even look out her kitchen window because the building the Petitioner had placed in the driveway was directly in front of her window. (JA000584-JA000585)

The Petitioner then presented her witnesses and evidence. The Petitioner's son, Dillon Goodwin testified inconsistently, but ultimately, he did admit that he had seen the Respondents' vehicles in the driveway. (JA000631) James Lobb also testified to his time as Mayor and while on city council and said he knew Mr. Shaffer thought the driveway belonged to him. (JA000642)

The Petitioner did not deny placing the obstructions on the Shaffer driveway and said she relied on the dismissal of the 2015 to support and justify her actions. (JA000665-JA000669, JA000143-JA000145) On cross, the Petitioner testified she was familiar with her 1999 deed and the survey plat referred to therein and attached thereto. (JA000671-JA000676) The Petitioner testified regarding the metes and bounds description contained in her deed compared to the plat. (JA000671-JA000676, JA000887-JA000890) A simple review of these documents show the Petitioner did not own the alley. (JA000887-JA000889)

At one point the Petitioner does admit she saw the Respondents parked in the driveway. (JA000682) She also testified that she never saw a car parked there "in the 80's." (JA000676) The Petitioner qualified this testimony by stating she "didn't know what they drove." (JA000676).

The Petitioner testified that she and/or her husband installed a white decorative fence when they had their pool installed. (JA000678-JA000680) The Petitioner also testified this white decorative fence was installed in 2003 and that it went "around the entire property line." (JA0000066, JA000662, JA000678- JA000680) The Petitioner was then asked about an affidavit she signed in 2019 and filed in the instant case where she stated, under oath, that the decorative fence was installed in 2010. (JA000678-JA000680, JA000916-JA000917) At one point while testifying, the Petitioner said she was confused. (JA000678) After being confronted with her affidavit, the Petitioner acknowledged the decorative fence, she and her husband installed in 2010, did not block or otherwise obstruct the Respondents' driveway. (JA0000066, JA000662-JA000664) The Petitioner rested after presenting the testimony of the Petitioner.

The lower Court then met with counsel and conferred regarding the charge to the jury. (JA000711-JA000736) The Court instructed the jury on the law (JA000746-JA000779), counsel presented their closing arguments, (JA000780-JA000808) and the jury was sent to deliberate with a copy of the Judge's Charge. (JA000746-JA000779) Following deliberations, the jury returned a verdict in favor of the Respondents on each count and awarded the Respondents compensatory damages in the amount of $10,000.00 and punitive damages in the amount of $10,000.00. (JA000814-JA000818) It is from this properly impaneled and properly instructed jury's verdict the Petitioner has now appealed.

III. SUMMARY OF THE ARGUMENT

This Court should affirm the lower court's rulings and uphold the jury verdict because: A) the lower court properly found this case is not barred by the doctrine of *res judicata* (JA000016-JA000020); B) the lower court correctly found the Respondents presented sufficient evident to

support the jury verdict on their claims of Prescriptive Easement, Nuisance and Punitive Damages (JA000011-JA000016); C) the Circuit Court correctly denied the Petitioner's motion for a new trial based on Rule 19 as all necessary parties were joined by the Respondents' Amended Complaint (Joining Indispensable Parties) (JA000023-JA000025); and D) The Circuit Court correctly denied the admission of an unverified pleading filed by a disbarred attorney on behalf of the Respondents to justify the Petitioner's outrageous conduct.(JA000025-JA000027)

A. The lower court properly found this case was not barred by the doctrine of *res judicata*:

The Petitioner first alleges the Circuit Court erred in not dismissing this case on the ground of *res judicata.* According to the Petitioner's brief, the Petitioner believes she had to relitigate the same issues presented in the 2015 case. (Petitioner's Appeal brief, page 6) This is simply not true. The 2015 case was substantially different from the case at hand. The instant case involves different claims, different parties, and different allegations than those presented in the 2015 case. Therefore, this case is NOT barred by *res judicata.*

Pursuant to Blake, in order for the Court to bar the instant case on the basis of *res judicata,* three elements must be satisfied. Syl. Pt. 4, Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 498 S.E.2d 41 (1997). First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Id. The Petitioner fails to satisfy these three (3) required elements.

First, there was no final adjudication on the merits regarding the claims in the instant case as many of the facts alleged in the instant case had not yet occurred. Preston County Civil Action 15-C-150 was filed in September of 2015 and dismissed following a telephonic hearing in November of 2015. Further the Court's 2015 Order did not determine the rights of the Indispensable Parties and only determined the Respondents did not own their driveway by deed. (JA000143-JA000145) (JA000016-JA000020)

Second, the 2015 case did not involve the same parties or those in privity with the parties in this case. The 2015 case named only the Respondents in this appeal, the Petitioner, and her late husband. The rightful owners of the driveway or alley were not added as parties and did not have an opportunity to be heard. (JA000143-JA000145) In the instant case, an additional eleven (11) defendants were joined and included in the case as they each held an express easement to the alley at issue in the case at hand. (JA000064-JA000074, JA000016-JA000020)

Third, the claims in the instant case were not presented or determined in the 2015 case. The claims of trespass, civil conspiracy, and private nuisance, were not presented in the 2015 case because each of these claims occurred in 2016 and thereafter. (JA000016- JA000020, JA000053-JA000059, JA000064-JA000074)

The 2015 case did not determine any of the claims presented in the instant case as they were not available under the declaratory judgment statute. The 2015 case did not result in a final adjudication on the merits regarding the rightful owners of the alley. The 2015 case did not include the indispensable parties, the prescriptive easement claim, the nuisance claim, the trespass claim or the conspiracy claim. Therefore, the Circuit Court correctly denied the Petitioner's motion to dismiss based on *res judicata.* (JA000016-JA000020)

B. The lower court correctly found the Respondents presented sufficient evidence to support the jury verdict on their claims of Prescriptive Easement, Nuisance and Punitive Damages:

The Respondents presented sufficient evidence to support the jury verdict on their claims of prescriptive easement, punitive damages and nuisance. (JA000002-JA000027)

Initially, it is important to note that the Circuit Court properly instructed the jury on the elements required to prove a prescriptive easement, "In order to obtain an easement or right of way by prescriptive easement, the Plaintiffs, the Shaffers, must prove, by clear and convincing evidence: (1) the adverse use of another's land; 2) that the adverse use was continuous and uninterrupted for at least ten years; 3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used." O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010) (JA000762-JA000766)

The Circuit Court also properly instructed the jury regarding punitive damages based on W. Va. Code § 55-7-29(a), which states, "An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." (JA000773), W. Va. Code § 55-7-29(a)

The Circuit Court also properly instructed the jury on the elements required to prove private nuisance based on *Booker.* (JA000766-JA000768), Booker v. Foose, 216 W.Va. 727, 613 S.E.2d 94 (2005) The properly impaneled and properly instructed jury rendered a verdict based on the testimony and evidence presented during the four (4) day jury trial. (JA000202-JA000880)

There are four elements to consider when determining whether there was sufficient evidence to support a jury verdict: "(1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus point 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983), as cited by Smith v. Clark, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019)

Once this Court reviews the transcript of the trial, reads the testimony of the witnesses, views the exhibits that were admitted, and looks at the relevant law, it will be clear that the Respondents presented more than sufficient evidence to support the jury's verdict. (JA000202-JA000202-JA000826) Accordingly, the jury's verdict should be upheld.

C. The Circuit Court correctly denied the Petitioner's motion for a new trial based on Rule 19 as all necessary parties were joined by the Respondents' Amended Complaint (Joining Indispensable Parties).

All indispensable parties who hold an interest in the subject were properly joined and given an opportunity to be heard in the instant case. The Petitioner's claim that a new trial should be awarded because she believes there are additional parties who held an interest in the alley is misguided and incorrect. The lower court properly identified the necessary parties with an interest in the private alley and those parties were properly joined by the Respondents' Amended Complaint (Joining Indispensable Parties). (JA000064-JA000074)

However, the Petitioner argues the Respondent's witness, Kenneth Moran, testified that a small corner of the alley may be owned by the "heirs of PJ Crogan." However, Kenneth Moran's testimony did not determine the rightful owners of the disputed property. (JA000760-JA000761)

The lower court, based on the 1900 deed from Brown to Watson, read in conjunction with the Circuit Court's 1970 opinion in *Whetsell*, determined the rightful owners of the alley. (JA000023-JA000025, JA000031-JA000032, JA000033-JA000038)

The lower court determined, as a matter of law, that the disputed property and private alley belonged to owners of lots fronting on Brown Avenue. (JA000023-JA000025) Following Mr. Moran's testimony, the Petitioner alleged there were now additional "indispensable parties" that would need to be joined in the case, or the Court would need to either strike the testimony or provide the jury with a limiting instruction. Mr. Turner specifically said, "So, I mean, either we need to have it struck or we need a limiting instruction that that opinion needs to be disregarded, or we've got indispensable parties." (JA000455)

The lower court did exactly what the Petitioner's counsel requested. The lower court struck the part of Mr. Moran's testimony as the same related to the ownership of the disputed alleyway. (JA000760-JA000761) The jury was instructed to disregard the testimony of Mr. Moran as the Court determined, as a matter of law, that the disputed property is owned by the Brown Avenue property owners, so no additional indispensable parties were necessary to provide complete relief to those already named. (JA000760-JA000761)

Because the lower court correctly concluded, as a matter of law, that the owners of the private alley had previously been determined by the lower court in an opinion issued in Preston County Case, Robertson v. Whetsell, Preston County Civil Action No. 484. In the *Whetsell* case, and the jury was properly instructed on this issue, the Petitioner's claim that additional parties were indispensable is incorrect. (JA000876-JA000881) Every owner of a lot fronting on Brown Avenue was properly joined by the Respondents' Amended Complaint (Joining Indispensable Parties). (JA000064-JA000074) Based on the factors set forth in Capitol Fuels, Inc. v. Clark

Equip. Co., 176 W. Va. 277, 280, 342 S.E.2d 245, 248 (1986), the lower court correctly determined the rightful owners of the alley. (JA000746-JA000779) And, the lower court's ruling and the jury verdict should be upheld.

D. The Circuit Court did not abuse its discretion when he denied the Petitioner's request to admit an unverified pleading, filed by a disbarred attorney on behalf of the Respondents, to mitigate the Petitioner's outrageous conduct.

The Petitioner's last complaint is that she was unable to present evidence of mitigation. This argument is also without merit. The Petitioner had the opportunity to testify and did, in fact, testify regarding her justification for obstructing the Respondent's driveway in 2016. (JA000665 – JA000669) The Petitioner was also allowed to admit into evidence the Complaint from the declaratory judgment action as well as the Order dismissing the declaratory judgment action. (JA000927- JA000929)

The Circuit Court did not abuse its discretion when it denied the Petitioner's request to admit proposed findings of fact and conclusions of law prepared by the Respondent's former attorney (who was later disbarred). The Petitioner was permitted to present testimony and two pleadings, including the Order Dismissing the 2015 case to justify the actions she, her late husband, and their agents took when they obstructed and blocked the Shaffer Respondents' driveway. (JA000665-JA000669) Accordingly, the Petitioner was able to, and did, present both testimony and evidence to mitigate her damages to the jury. (JA000665-JA000669) Apparently, the jury didn't think the Petitioner justified her actions. (JA000814-JA000818) The jury found the Petitioner's outrageous actions warranted an award of punitive damages. (JA000814-JA000818) This Court should not disturb the jury's verdict.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents believe oral argument is unnecessary as the assignments of error presented by the Petitioner were decided appropriately by the Circuit Court and oral argument would not aid the decisional process. The Respondents believe a memorandum decision by the Court upholding the Circuit Court's rulings as well as the verdict of the jury would be appropriate.

V. ARGUMENT

A. STANDARD OF REVIEW

To determine the propriety of a circuit court's ruling, the appellate court employs a multifaceted standard of review. Reviews of a circuit court's final order and ultimate disposition shall fall under an abuse of discretion standard. Reviews to challenges of the lower Court's findings of fact fall under a clearly erroneous standard; and conclusions of law are reviewed *de novo*. See generally, Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syl. pt. 1, *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997). *See also Clark v. Kawasaki Motors Corp., U.S.A.*, 200 W. Va. 763, 766, 490 S.E.2d 852, 855 (1997); Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 492 S.E.2d 167 (1997) as cited by Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 474

The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure is *de novo*. Syl. Pt. 1,Fredeking v. Tyler, 224 W. Va. 1, 2, 680 S.E.2d 16 (2009)

However, when this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of

Civil Procedure, "[It is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." Syl. Pt. 2, Fredeking v. Tyler, 224 W. Va. 1, 2, 680 S.E.2d 16 (2009)

B. THIS CASE IS NOT BARRED BY *RES JUDICATA:* The circuit court correctly applied the factors set forth in Blake when it denied the petitioner's motion to dismiss on the ground of *res judicata.* Blake v. Charleston area med. Ctr. Inc., 201 W.VA. 469, 498 S.E.2d 41, (1997) (JA000016-JA000020)

"Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 498 S.E.2d 41 (1997). All three elements must be met to bar prosecution on the ground of *res judicata.* Id. The Petitioner fails to satisfy these elements. (JA000016-JA000020)

First, there was no final adjudication on the merits regarding the claims brought in the instant case. (JA000016-JA000020) Preston County Civil Action No.:15-C-150 (sometimes herein referred to as the "2015 case") only determined whether the Respondents owned their driveway pursuant to the parties' respective deeds. The 2015 case did not determine the parties

legal right to use the private alley or who owned an interest in the alley, a portion of which the Respondents were using as their driveway. (JA000802)

Second, the 2015 case did not involve the same parties or those in privity with the parties in the current case. The 2015 case named only the Respondents in this appeal, the Petitioner, and her late husband. (JA000927-JA000929) An additional eleven (11) defendants were added in the instant case as "indispensable parties." This Court required their joinder so complete relief could be granted to all parties with an interest in the private alley. (JA000064-JA000074)

Third, the claims in the instant case were not presented or determined in the 2015 case. The claims of trespass, civil conspiracy, nuisance, and prescriptive easement were not asserted in the Complaint filed in the 2015 case. (JA000930-JA000936)

The Court in the 2015 case could not determine any of the claims presented in the instant case as the court did not have jurisdiction under the declaratory judgment statute. The 2015 case could not have resulted in a final adjudication on the merits as it did not include the indispensable parties, did not rule on the prescriptive easement claim, the nuisance claim, the trespass claim or the conspiracy claim. (JA00016-JA000020)

There was never a final adjudication on the merits regarding a claim for prescriptive easement. The 2015 case was only on the Court's active docket for about two months before the Court held the hearing after which it dismissed the action under W.Va. Code §55-13-1, et seq. The Complaint requesting relief under the W.Va. Declaratory Judgment Act was filed in September of 2015, did not allege a prescriptive easement and then dismissed the case following a telephonic hearing in November of 2015. The Court only reviewed and determined the parties' rights under their deeds of record. The Court did not consider, on the merits, the Plaintiffs' claim of a prescriptive easement because that issue could not be dealt with under the limited scope of

W.Va. Code §55-13-1, et seq. and the indispensable parties were not given notice. (JA000927-JA000929) Further, the 2015 action did not consider the Plaintiffs' claims of nuisance, trespass, or civil conspiracy as those issues were not included in the declaratory judgment action and the basis for those claims occurred in 2016 and thereafter. (JA000064-0000074, JA000927-JA000929)

In October of 2023, the W.Va. Supreme Court considered whether a claim was barred by res judicata in Chalifoux. Chalifoux v. W. Virginia Dep't of Health & Hum. Res., No. 21-0902, 2023 WL 7038448 (W. Va. Oct. 26, 2023) The Court took into consideration whether the claimant had time to amend or alter the Complaint in the first action to have all of the issues determined. Id. In Chalifoux, the Court found, the claimant, Chalifoux, had over two years during the pendency of the injunctive action to amend his complaint to assert the additional claims. Chalifoux v. W. Virginia Dep't of Health & Hum. Res., No. 21-0902, 2023 WL 7038448, at *12 (W. Va. Oct. 26, 2023)

In contrast to Chalifoux, and looking at the facts of the 2015 case on which the Petitioner relies for her claim of *res judicata;* the previous matter was open for about 2 months, not 2 years. In addition, the 2015 case was determined, based solely on the parties' deeds pursuant to W.Va. Code §55-13-1 et seq. (JA000927-JA000929) There was no final adjudication regarding a prescriptive easement. Id.

Additionally, the prior action did not involve the same parties or parties in privity. The previous action did not name the "indispensable" party defendants that were joined, by necessity, in the instant case. (JA000064-JA000074) The Defendants, Paul and Mary Somerruck, Theresa Bautista, Paul and Wendy Hart, Ajane Properties, Patrick "PJ" Crogan and Jane Crogan, Christopher Raneri, French Barnett, Jr., and James H. Wolfe were not included as parties in the

2015 case and were never served with notice of the 2015 case. They were never joined because the Court only determined if the Petitioner's deed and the Respondents' deed were in conflict or if there was any ambiguity pursuant to W.Va. Code §55-13-1 et seq. (JA000016-JA000020)

The indispensable parties who were properly joined in the instant case were not in "privity" with the parties in the 2015 case. They were not predecessors in title to either the Respondents or the Petitioner. In general, it may be said that ... privity involves a person so identified in interest with another that he represents the same legal right." 204 W. Va. at 478, 513 S.E.2d at 705. Our Supreme Court expanded upon this formulation in Rowe v. Grapevine Corp., 206 W. Va. 703, 527 S.E.2d 814 (1999), holding that privity "is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include the other within the *res judicata*." *Id.* at 715, 527 S.E.2d at 826 (citation omitted). Baker v. Chemours Co. FC, LLC, 244 W. Va. 553, 562, 855 S.E.2d 344, 353 (2021)

Nothing in the evidence supports the Petitioner's position that she was in privity with the Defendants in the case at hand. (JA000016-JA000020) Therefore, the 2015 action did not involve the same parties or persons in privity with these parties in order to satisfy the second element. Further, the Petitioner's actions in obstructing the alley would have clearly been adverse to the Brown property owners' interest in the alley, so their interest were not aligned. The Respondents were not in privity with the indispensable parties, because the Respondent had blocked the use of their alley for over 40 years. (JA000202-JA000585) This use of the alley was clearly adverse to the owners of the alley. (JA000202-JA000585)

Third, as set forth herein, the instant case sought a prescriptive easement, damages for trespass, nuisance, civil conspiracy, and punitive damages. (JA000064-JA000074) The 2015 did not assert and therefore did not determine the issue of whether or not the Shaffers obtained a

prescriptive easement, it only determined the respective rights of the parties based on a reading of the parties' respective deeds of record. (JA000927-JA000929) The two (2) page Order Dismissing the declaratory judgment action flowed from a telephonic hearing held about two (2) months after the case was filed. (JA000927-JA000929)

The Court in the 2015 case found any questions of adverse possession or of prescriptive easement were outside the realm of a declaratory judgment action. (JA000802, JA000927-JA000929) Therefore, the dismissal of the 2015 case could not be a "final adjudication on the merits" regarding the Shaffers' claim they had obtained a prescriptive easement because the Court did not have the authority to make that determination under W.Va. Code §55-13-1 et seq.

Moreover, the additional claims set forth in the instant action are based on facts occurring after 2016, when Petitioner and her co-conspirators placed a gate, a building, and other obstructions in the Shaffers' driveway. ((JA000064-JA000074) (JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475- JA000502, JA000516-JA000525, JA000536, JA000543- JA000551, JA000564- JA000569, JA000547-JA000550)

Our Supreme Court has found that where new allegations have occurred after a decision was made in the first instance, the matter is not barred by res judicata. In re J.L.-1, No. 21-08848, 2022 WL 4593186. In the J.L. case, the Court refused to apply the doctrine of *res judicata* to a case where, "[n]ew allegations were raised in the amended petition—including conduct that occurred up to and including the second adjudicatory hearing." Based on the new allegations that occurred after the initial case was brought, the Court found the claims of the Petitioner were not barred by *res judicata.* In re J.L.-1, No. 21-08848, 2022 WL 4593186.

Our Supreme Court then took the "...opportunity to emphasize that the doctrine of res judicata 'must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.'" Id. The holding went further to say this Court will "not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice." In re J.L.-1, No. 21-0848, 2022 WL 4593186, at *4 (W. Va. Sept. 30, 2022) "[The doctrine of *res judicata*] is not rigidly enforced where to do so would plainly defeat the ends of justice. Gentry v. Farruggia, 132 W. Va. 809, 811, 53 S.E.2d 741, 742 (1949)

A rigid enforcement of *res judicata* in the instant case, based solely on a hasty decision dismissing a Declaratory Judgment action brought pursuant to W.Va. Code §55-13-1, et seq., would be fundamentally unfair and would defeat the ends of justice. (JA000016-JA000020)

The 2015 case was filed in September of 2015 and dismissed after a telephonic hearing in November 2015. (JA000927- JA000929) The instant action was filed by the Respondents on January 24, 2018. (JA000949) The parties filed initial pretrial memos in April of 2019. (JA000949-JA000950) Motions to Continue were filed by the Petitioner on September 30, 2019 and October 7, 2019. (JA000950-JA000951) After holding two evidentiary hearings on a Motion for Summary Judgment filed by the Respondents, on October 28, 2020, the lower court granted partial summary judgment to the Respondents. (JA000951) That decision was appealed by the Petitioner, and in April of 2022, our West Virginia Supreme Court reversed and remanded the issue back to the Circuit Court, noting there were questions of fact that needed to be put before a jury. (JA000951), Goodwin v. Shaffer, 246 W.Va. 354, 873 S.E.2d 885 (2022)

This Petitioner again filed a motion to continue October 25, 2022. (JA000951) In February of 2023, the Court held a status hearing at which time the Petitioner's pretrial memo contained a

concern about indispensable parties. So, after discussion and argument, the Court Ordered the Respondents to amend their complaint and add the Brown Avenue property owners as indispensable parties. (JA000952, JA000064-JA000074) The Respondents filed their Amended Complaint (Joining Indispensable parties) on March 9, 2023. (JA000064-JA000074) Answers to the Respondents' Amended Complaint (Joining Indispensable Parties) were filed by Defendants Paul and Mary Somerruck and Thresa Bautista (JA000953) Finally, on September 18, 19, 20, and 21, 2023 the issues in this case were heard by a properly impaneled jury. (JA000202-JA000826) The jury provided these parties (including the Indispensable parties) with a "final adjudication on the merits." (JA000814-JA000818)

Curiously, from January of 2018, when this case was originally filed, until September of 2023, a period of more than five (5) years, the Petitioner never filed a motion to dismiss on the ground of *res judicata.* (JA000016, JA000949-JA000960) This issue could have been decided by the lower court years ago and prior to the trial if the Petitioner actually wanted to prevent unwanted litigation. (JA000949-JA000960) The Petitioner says it is simply a question of law. If the Petitioner really did not want to re-litigate the issue of the prescriptive easement, why did she continue to litigate the issue for five years before filing her motion to dismiss and then only file the motion during the trial? (JA000949-JA000960) In the interest of justice and fundamental fairness, this Court should find this case is not barred by the doctrine of res judicata. The verdict returned by the jury following a four (4) day trial is a final adjudication on the merits and should be upheld. (JA000814-JA000818)

C. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY VERDICT FINDING THE RESPONDENTS HAD OBTAINED A PRESCRIPTIVE EASEMENT: The Circuit Court correctly found the respondents presented

sufficient evidence to support the jury verdict finding the respondents owned a prescriptive easement for the driveway they had used for more than 40 years.

West Virginia has a four part test this Court must consider to determine whether there is sufficient evidence to support a jury verdict: "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus point 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983), as cited by Smith v. Clark, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019)

After considering the evidence presented at trial, this Court will undoubtably find and conclude the Respondents presented more than sufficient evidence to support the jury's verdict. Sufficient evidence was presented to support the jury's verdict finding the Respondents obtained a prescriptive easement and, sufficient evidence was presented to support the jury's verdict finding the Petitioner created a private nuisance. (JA000202-JA000779, JA000814-JA000818)

"In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus point 12, *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008), cited by Syl. Pt. 8, Smith v. Clark, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019)

"When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to

the evidence or without sufficient evidence to support it." Point 4, Syllabus, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894.' Syllabus Point 2, *Walker v. Monongahela Power Co.,* 147 W.Va. 825, 131 S.E.2d 736 (1963)." Syllabus point 5, *Toler v. Hager,* 205 W.Va. 468, 519 S.E.2d 166 (1999), Neely v. Belk Inc., 222 W. Va. 560, 563, 668 S.E.2d 189, 192 (2008)

The Petitioner does not allege the Court's jury instructions regarding prescriptive easements were improper, so this Court must conclude this case was "fairly tried" under "proper instructions." Id. The lower Court instructed the Jury, "In legal terms, James and Iris Shaffer claim that their use of the private alley entitles them to what is called an 'easement' or 'right of way.' An 'easement' or 'right of way' is a right that one person has to use the land of another for a specific purpose." (JA000762-JA000766)

The jury instructions told the jury, "In order to obtain an easement or right of way by prescriptive easement, the Plaintiffs, the Shaffers, must prove, by clear and convincing evidence: (1) the adverse use of another's land; 2) that the adverse use was continuous and uninterrupted for at least ten years; 3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used." O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010) (JA000762-JA000766)

The jury was further instructed. "The Shaffers must prove each of the four elements by clear and convincing evidence; if you find they have failed to prove a single element, then you must find they did not prove their case." (JA000762-JA000766)

The jury was instructed by the lower court that the term "adverse use" does not "imply that the person claiming a prescriptive easement has animosity, personal hostility, or ill will

toward the landowner; instead, adverse use is measured by the observable actions and statements of the person claiming a prescriptive easement and the owner of the land." O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010) (JA000762-JA000766)

The Court also instructed the jury that "Adverse use," for purposes of a claim of prescriptive easement, generally means the use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one." O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010) (JA0000762-JA000766) The Court further instructed the jury that in the context of prescriptive easements, an "adverse use" is "one that creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to the law." Carr v. Veach, 244 W. Va. 73, 851 S.E.2d 519 (2020). (JA000762-JA000766)

Therefore, the jury verdict in this case declaring the Respondents obtained a prescriptive easement is presumptively valid and should not be set aside. This case was fairly tried, with a properly empaneled jury who were provided with proper instructions. *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008), Syl. Pt. 6, Smith v. Clark, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019)

As the trier of fact, the jury heard the testimony of witnesses and reviewed Exhibits as properly admitted by the Court. (JA000202-JA000745) After deliberations, the jury returned a verdict in favor of the Plaintiffs. (JA000814-JA000818) The jury found the Plaintiffs had proven, by clear and convincing evidence, that the Plaintiffs had acquired a prescriptive easement to the alley-way as shown on surveys presented to the jury. (JA000011- JA000016, JA000885, JA000889, JA000814-JA000818)

The jury's verdict is supported by testimony of the witnesses who testified at trial; James R. Shaffer, Timothy Shaffer, Thomas Shaffer, PJ Crogan, Ellen White, Marilyn Coffman, and James Shaffer. (JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475- JA000502, JA000516-JA000525, JA000536, JA000543- JA000551, JA000564-JA000569, JA000547-JA000550) Each of these witnesses had personal knowledge of the Respondents' continuous use of the alley way as the Respondents' driveway since 1973 and how the loss of their driveway negatively impacted the Respondents' daily lives, causing them emotional distress, annoyance, aggravation, inconvenience and anxiety. (JA000001-JA000044, JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475-JA000502, JA000516-JA000525, JA000536, JA000543- JA000551, JA000564- JA000569, JA000547-JA000550)

Therefore, the Circuit Court correctly determined the Respondents provided sufficient evidence to support the jury verdict regarding the prescriptive easement and the jury's verdict should stand. (JA000814 – JA000818)

D. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY VERDICT FINDING THE ACTIONS OF THE PETITIONER WARRANTED AN AWARD OF PUNITIVE DAMAGES. The Circuit court correctly found the Respondents presented submitted sufficient evidence to support the jury verdict awarding the Respondents' punitive damages against the Petitioner. The jury properly determined the outrageous actions of the Petitioner, and her co-conspirators warranted an award of punitive damages. (JA000022-JA000023, JA000814-JA000818)

"An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result

of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code § 55-7-29(a)

The evidence in this case showed the Petitioner, along with her co-conspirators erected fences, buildings, and other obstructions in the Plaintiffs' driveway in 2016. These obstructions prevented the Respondents from parking their vehicles next to their home and caused the elderly Respondents terrible inconvenience, aggravation, and frustration. (JA000227-JA000250, JA000251-JA000260, JA000287-JA000304, JA000326-JA000344, JA000348- JA000356, JA000365-JA000376, JA000416, JA000463-JA000469, JA000475- JA000502, JA000516-JA000525, JA000536, JA000543- JA000551, JA000564- JA000569, JA000547-JA000550)

The Petitioner knew or should have known the Respondents had a right to the continued use of the driveway, but she and her co-conspirators acted maliciously and with a reckless disregard to the health, safety and welfare of the others when they obstructed and prevented the elderly Respondents from using their driveway. (JA000812-JA000818)

The Court properly instructed the jury regarding punitive damages as follows: "In addition to regular damages, the Respondents are seeking punitive damages from Defendant Robin Goodwin. Although I am explaining the law of punitive damages, it does not mean that I have any opinion on whether punitive damages should be awarded. That decision is yours alone. You are not required to award punitive damages." (JA000773-000775)

The Court further instructed the jury, "If you find that the Defendant Robin Goodwin, her late husband, or their agents acted in good faith in their conduct, then this could be a mitigating or defense to the award of punitive damages. As a general proposition, the purposes of punitive damages are: (1) to punish a wrongdoer for conduct that harmed another party; and (2) to

discourage a wrongdoer and others from acting the same way in the future. Therefore, punitive damages are damages that are awarded to punish and deter wrongdoers. Punitive damages are in addition to damages you award to compensate a party for injuries or losses." (JA000773-JA000776)

"Punitive damages may be awarded where you find by clear and convincing evidence that the Defendant Robin Goodwin and/or her late husband or agents acted with actual malice toward the Respondents, the Shaffers. Or that the Defendant Robin Goodwin and/or her late husband or agents acted with a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others. 'Clear and convincing' evidence is proof that produces in your mind a firm belief or conviction that actual malice, or that conscious, reckless, and outrageous indifference to the health, safety, and welfare of others, has been established. 'Actual malice' may be found where you find that Defendant Robin Goodwin, her late husband, or their agents acted with a state of mind shown by conduct that was intended to or was substantially certain to injure the Shaffer Respondents without any just cause or excuse." (JA000773-JA000779) W.Va. Code 55-7-29

The Court's instructions explained the following to the jury, "[t]herefore, if you find from the evidence that Petitioner, her late husband, or their agents committed a wrongful act with actual malice toward the Shaffers or acted with a conscious, reckless, and outrageous indifference to the health, safety, or welfare of others, then you may award the Shaffers punitive damages in an amount you believe is sufficient to punish Robin Goodwin and to serve as an example to prevent Robin Goodwin and others from acting in a similar way in the future. Remember, you are not required to award punitive damages and any punitive damages that are awarded must be in

addition to damages which are necessary to compensate the Shaffers for their injuries or losses." (JA000773-JA000779)

The jury found Petitioner and/or her agents had 1) engaged in an unreasonable, unwarrantable or unlawful activity, 2) that unreasonably interfered with the Respondents' use and enjoyment of their property, and 3) the interference of the Respondents' enjoyment was so serious the Respondents should not be expected to bear it without compensation. (JA000814-JA000818)

The jury's verdict awarding the Respondents punitive damages was supported by the evidence presented at trial. (JA000202-JA000842) The punitive damages awarded by the jury does not exceed the amounts permitted by W.Va. Code §55-7-29(c).

"When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it." Point 4, Syllabus, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894.' Syllabus Point 2, *Walker v. Monongahela Power Co.,* 147 W.Va. 825, 131 S.E.2d 736 (1963)." Syllabus point 5, *Toler v. Hager,* 205 W.Va. 468, 519 S.E.2d 166 (1999), Neely v. Belk Inc., 222 W. Va. 560, 563, 668 S.E.2d 189, 192 (2008)

The jury heard the testimony during trial, was able to determine the credibility of the witnesses and the jury was able to review the photos and exhibits, firsthand. (JA000202-JA000842) Moreover, "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Jackson v. State Farm Mutual Ins. Co., 215 W.Va. 624, 641, 600 S.E.2d 346, 353 (2004), citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986)

Accordingly, the lower Court properly denied the Petitioner's Motion for Judgment as a Matter of Law related to punitive damages because the Respondents submitted sufficient

evidence to warrant the jury's award of punitive damages consistent with W.Va. Code §55-7-29(a).

For these reasons, the lower Court properly denied the Petitioner's Motion for Judgment as a Matter of Law regarding the jury's award of punitive damages and the jury's verdict awarding punitive damages should not be disturbed. Neely v. Belk Inc., 222 W. Va. 560, 668 S.E.2d 189 (2008), Syl. Pt. 6, Smith v. Clark, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019)

E. SUFFICENT EVIDENCE WAS PRESENTED TO SUPPORT THE JURY VERDICT FINDING THE PETITIONER CREATED A PRIVATE NUISANCE. The Circuit Court correctly found the Respondents presented sufficient evidence to support the jury verdict finding the Petitioner created a private nuisance. (JA000021)

The jury in this case heard the evidence and was properly advised of the law by the lower court. JA000766-JA000768. The Jury, after hearing the evidence and being properly instructed by the Court, found the Defendant Goodwin had 1) engaged in an unreasonable, unwarrantable or unlawful activity, 2) that unreasonably interfered with the Plaintiffs' use and enjoyment of their property, and 3) the interference of the Plaintiffs' enjoyment was so serious the Plaintiffs should not be expected to bear it without compensation. (JA000814-JA000818) The jury's verdict was supported by the testimony and witnesses presented at trial. (JA000202-000680) The lower court found the Respondents presented sufficient evidence to support the jury verdict finding the Petitioner and her co-conspirators created a private nuisance. (JA000021)

Based on the multitude of witnesses who testified to the unreasonable interference the Petitioner and her co-conspirators caused the Respondents in this case, this Court should affirm the lower courts' ruling and uphold the jury verdict finding the Petitioner and her co-conspirators created a private nuisance. (JA000202-JA000808, JA000814-JA000818)

D. ALL INDISPENSABLE PARTIES WERE JOINED PURSUANT TO RULE 19. The Circuit Court properly denied the Petitioner's Motion for a New Trial pursuant to Rule 19 as all interested parties were joined by the "Amended Complaint (Joining Indispensable Parties)." (JA000023-JA000025)

"Persons to Be Joined If Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action." W. Va. R. Civ. P. 19

The lower Court concluded there were no additional "indispensable parties" whose joinder was required in this case. (JA000760-JA000761) The lower Court determined the owners of the lots fronting on Brown Avenue, who were granted an express easement to the private alley, were properly joined and given notice and an opportunity to be heard. (JA000001-JA000044, JA000064-JA000074, JA000874-JA000875, JA000876-JA000881)

The lower Court further concluded, as it did before the trial, that the rightful owners of the private alley were determined, as a matter of law, in Robertson v. Whetsell, Preston County Civil Action No. 484. In Whetsell, the Court reviewed the 1900 deed, found in Deed Book 88, page 438 conveying the private alley to the owners of property fronting on Brown Avenue and

determined the owners of property fronting on Brown Avenue were granted an express easement. (JA0000746-JA000779) There are three factors to consider when determining if a party's joinder is required and/or necessary. See generally, Capitol Fuels, Inc. v. Clark Equip. Co., 176 W. Va. 277, 280, 342 S.E.2d 245, 248 (1986)

First, a person is to be joined as a party to a pending action where complete relief cannot be granted by the court in his or her absence. Id. In the case at hand, complete relief was granted to all persons with an interest in the private alley as each of the owners were properly joined in the instant case. Id., Robertson v. Whetsell, Preston County Civil Action No. 484, (JA000760-JA000761)

Second, a person is to be joined if he or she claims an interest in the subject matter of the action that will be impaired as a result of the action. Capitol Fuels, Inc. v. Clark Equip. Co., 176 W. Va. 277, 280, 342 S.E.2d 245, 248 (1986) In this case, there were no additional persons asking to be joined or claiming an interest in the subject matter of the action. Finally, an absent person is to be joined if failure to do so subjects those already parties to a substantial risk of incurring multiple liability. Capitol Fuels, Inc. v. Clark Equip. Co., 176 W. Va. 277, 280, 342 S.E.2d 245, 248 (1986)

The lower Court found little to no risk that the so-called "Heirs of PJ Crogan" will file any legal paperwork claiming an ownership in the private alley as they have had since 1970 to contest the ownership of the private alley, but they have not. (JA000001-JA000044)

Further, the lower court struck the testimony of Kenneth Moran regarding his testimony that the "heirs of PJ Crogan" could have an interest in a small corner of the alley. Th lower Court, as a matter of law, correctly determined the Brown Avenue property owners were the rightful owners of the private alley and no one else. (JA000746-JA000779) Consequently, the

presence of the "Heirs of PJ Crogan" were not necessary to give complete relief to those already parties. (JA000760-JA000761)

The lower Court did consider whether the "Heirs of PJ Crogan" have a claim that, if they are not joined, will be impaired or result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations. (JA000001-JA000043) In answering this question, the lower court concluded the "Heirs of PJ Crogan" do not have an interest in the subject property based on the Court's previous decision in *Whetsell*. Robertson v. Whetsell, Preston County Civil Action No. 484 (JA000746-JA000779) Consequently, the lower court properly found the joinder of the "Heirs of PJ Crogan" was not required and the existing parties would not be subject to a substantial risk of multiple or inconsistent obligations if they were not joined. Wachter v. Dostert, 172 W. Va. 93, 93, 303 S.E.2d 731, 732 (1983) (JA000001- JA000043)

Therefore, this Court should affirm the lower court's ruling and uphold the jury verdict.

E. THE PETITIONER WAS ABLE TO PRESENT HER TESIMONY AND EVIDENCE TO MITIGATE HER DAMAGES: The Circuit Court did not abuse its discretion when it refused to allow the Respondent to admit an unverified pleading drafted by an attorney who was later disbarred to mitigate damages. (JA000025-JA000027)

The lower court correctly denied the Petitioner's request to admit an unverified pleading filed by the Respondents' former attorney (who has now been disbarred). (JA000004) Even without this one document, the Petitioner was given a full opportunity to testify regarding her mitigating factors. The Petitioner claimed she relied on the Order Dismissing the 2015 case as her justification for obstructing the Respondent's driveway. (JA000665 – JA000669) The lower Court allowed the Petitioner to admit two documents on which she said she relied; both the Complaint and the Order Dismissing the 2015 case were admitted during the Petitioner's testimony. (JA000927- JA000929)

Accordingly, the Petitioner was able to, and did present both testimony and evidence to mitigate her damages to the jury. (JA000665-JA000669) The jury just didn't believe the Petitioner's actions were justified. The jury may have mitigated her damages, they could have awarded more than $10,000.00 in punitive damages. (JA000814-JA000818) The jury is the trier of fact and they found the Petitioner's actions warranted an award of punitive damages to the Respondents. (JA000814-JA000818) This Court should allow the verdict to stand.

'The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. pt. 4, in part, Sanders v. Georgia–Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syllabus point 2, Estep v. Mike Ferrell Ford Lincoln–Mercury, Inc., 223 W.Va. 209, 672 S.E.2d 345 (2008)." Syllabus Point. 2, CSX Transp., Inc. v. Smith, 229 W. Va. 316, 320, 729 S.E.2d 151, 155 (2012)

The Petitioner was able to admit into evidence both the Complaint filed against her and her late husband in the 2015 (Preston County Circuit Court Case No. 15-C-150) case and the Order Dismissing the same. (JA000665-JA000669) The Petitioner testified the dismissal of the 2015 case was the reason she and her husband thought they could block the Respondents' driveway. (JA000665-JA000669) Accordingly, the Petitioner was given a full opportunity to mitigate her damages and try to justify her actions. (JA000665-JA000669)

Therefore, this Court should find the lower court did not abuse its discretion when he refused to admit an unverified pleading filed by a now disbarred attorney to bolster the Petitioner's alleged mitigation claim. (JA0000021)

CONCLUSION:

Based on the facts, arguments, and law set forth herein, the Respondents pray this Honorable Court will deny all relief requested by the Petitioner, affirm the lower court's rulings, and uphold the jury verdict.

Respectfully Submitted,

JAMES AND IRIS SHAFFER,
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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Robin Goodwin,
Defendant Below, Petitioner,

v. **No: 24-ICA-321**

James R. Shaffer and
Iris M. Shaffer,
Plaintiffs Below, Respondents.

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CERTIFICATE OF SERVICE

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I, Lisa Hyre, counsel for the Respondents, James R. Shaffer and Iris M. Shaffer, do hereby certify that I served the foregoing, "Respondents' Brief" upon the Petitioner's counsel, Gaydos and Turner, PLLC via File and Serve Express, and upon the following Defendants by US Mail, postage prepaid this 3rd day of January, 2025:

1. Paul and Mary Sumerruck, 118 Brown Avenue, Kingwood, WV 26537;
2. Teresa Bautista, 116 Brown Avenue, Kingwood, WV 26537;
3. Paul and Wendy Hart, 2764 North Preston Hwy, Albright, WV 26537;
4. AJane Properties, LLC, 106 Brown Ave., Kingwood, WV 26537;
5. Patrick and Jane Crogan, 106 Brown Ave., Kingwood, WV 26537;
6. Christopher Ranieri, (new address) 521 South 11 Street, Purcellville, VA 20132;
7. French Barnett, Jr., 102 ½ Brown Ave., Kingwood, WV 26537;
8. James Wolfe, III, c/o Michael and Erika Anderson, 100 Brown Ave., Kingwood, WV 26537.

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